

IN THE U.S. PATENT AND TRADEMARK OFFICE

Application No.:	08/285,363	Conf. No.: 5802
Filing Date:	August 3, 1994	Group Art Unit: 2772
Applicant:	Richard A. Becker et al	Examiner: Phu K. Nguyen
Title:	DYNAMIC GRAPHICAL ANALYSIS OF NETWORK DATA	

**REQUEST TO RECONSIDER DISMISSAL OF PETITION TO WITHDRAW
HOLDING OF ABANDONMENT, OR, IN THE ALTERNATIVE PETITION TO
REVIVE AN UNINTENTIONALLY ABANDONED APPLICATION**

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Alexandria, VA 22314
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November 10, 2010

Sir:

I. Request For Reconsideration & Renewal Of Original Petition

Applicants hereby request reconsideration of the Office of Petitions Decision dated September 10, 2010 ("Decision") dismissing Applicants' original May 20, 1999 Petition for Withdrawal of the Holding of Abandonment ("Petition") in the above-identified application. Applicants concurrently renew the Petition as well.

The basis for dismissing the Petition stated in the Decision is that the proposed reply contained in Applicants' Petition does not include "a Notice of Appeal (and appeal fee required by 37 CFR 41.20(b)(2)), an amendment that prima facie places the application in condition for

allowance, a Request for Continued Examination (RCE) and submission (37 CFR 1.114), or the filing of a continuing application under 37 CFR 1.53(b). See MPEP 711.03(c)(III)(A)(2)".

Because the Decision does not appear to set forth a proper rationale for dismissing the Petition, the Applicants' request reconsideration of the Decision. The Applicants' herein renew their Petition for withdrawal of the holding of abandonment. Applicants' attorney, John E. Curtin, hereby submits the following statement of facts and relevant MPEP sections in support of the request for reconsideration and renewal of Applicants' original Petition:

**A. STATEMENT OF FACTS SUBMITTED BY APPLICANTS' ATTORNEY
IN SUPPORT OF THE REQUEST FOR RECONSIDERATION AND
RENEWAL OF THE PETITION TO WITHDRAW HOLDING OF
ABANDONMENT**

- 1.) In October 3, 1997 the Applicants received a Final Office Action in this reissue application which requested that the Applicants file a corrected Oath/Declaration.
- 2.) On January 29, 1998 the Applicants' filed a complete response to the October 3, 1997 Office action along with a one-month extension of time and the appropriate fee. The January, 1998 response was filed using the USPTO's Express Mail mailing provisions. The response bears an Express Mail label of "EE186978536US" (see Exhibit labeled "1999 Petition Papers" attached).
- 3.) On December 16, 1998 the USPTO mailed a Notice of Abandonment indicating that the Applicants' had not responded to the October 3, 1997 Office Action.
- 4.) On May 20, 1999 the Applicants filed a "Petition to Withdraw the Examiner's Holding of Abandonment" (see Exhibit labeled "1999 Petition Papers"). The May 20th Petition included a copy of Applicants' January 29, 1998 response to the October 3, 1997 Office Action. The Petition included the following paragraph:

Applicants representatives subsequently received the Notice of Abandonment (Paper No. 20, dated December 17, 1998) on December 20, 1998. However, due to an administrative error, the Notice of abandonment was inadvertently misfiled in the case folder, and was only recently discovered and brought o Mr. Dinella's [one of Applicants' attorneys at the time], which prompted applicants' representatives to file this Petition immediately".

- 5.) On May 2, 2001 the Applicants filed an Associate Power of Attorney and Change of Correspondence Address granting the undersigned attorney and the law firm of Troutman Sanders with full power to prosecute the instant application, among other powers.
- 6.) Between March, 2002 and June, 2006 the undersigned attorney, and attorneys and paralegals working under his direction made repeated attempts in writing and via telephonic means to ascertain the status of Applicants' May 20, 1999 Petition to Withdraw the Holding of Abandonment from the USPTO. If required, the undersigned will produce copies of the emails, filed Status Requests and other documentation to substantiate this statement. To minimize the present record these have been omitted. For the Benefit of the Office of Petitions, the USPTO personnel involved included Special Examiner Crista Jesily, SPE Michael Razavi, Examiner Phu Nguyen, and Margo Carpenter, Administrative Officer.
- 7.) On August 30, 2006 the Applicants received a facsimile from Earlene Green, Special Examiner, USPTO. The facsimile included a "Notice Under 37 CFR 1.251-Abandoned Application" ("Notice")(see Exhibit labeled "2006 Reconstruction Request" attached). The Notice indicated, in sum, that "the file of the above-identified application cannot be located after a reasonable search. Therefore, the Office is initiating the reconstruction of the file of the above-identified application pursuant to the provisions of 37 CFR 1.251."
- 8.) In effect, the Notice indicated that the USPTO had lost the file history and was requesting that the Applicants to assist the USPTO in reconstructing the file history of the instant application.
- 9.) On November 15, 2006 the Applicants responded to the Notice and provided copies of all papers in Applicants' copy of the file history. At the same time the Applicants filed a new Power of Attorney granting the undersigned attorney and the Capitol Patent & Trademark Law Firm, PLLC with full power to prosecute the instant application, among other powers.
- 10.) On July 14, 2009 the undersigned telephoned Special Examiner Green to ascertain the status of the reconstruction and Applicants' Original Petition filed May 20, 1999. Examiner Green indicated that Examiner Bucci of the Office of Petitions was handling the Petition and would be working on a decision in response to the Petition.

B. RELEVANT MPEP SECTIONS RELATED TO APPLICANTS' REQUEST FOR RECONSIDERATION AND RENEWAL OF THE PETITION TO WITHDRAW HOLDING OF ABANDONMENT

11.) MPEP §711.03(c) (I)(B) states that "[a] petition to withdraw the holding of abandonment relying upon a timely reply placed in "Express Mail" must include an appropriate petition under 37 CFR 1.10(c), (d), (e) or (g)(see MPEP §513)."

12.) **37 CFR 1.10(c), (d), (e) and (g)** read as follows:

(c) Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that there is a discrepancy between the filing date accorded by the Office to the correspondence and the date of deposit as shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation, may petition the Director to accord the correspondence a filing date as of the "date-in" on the "Express Mail" mailing label or other official USPS notation, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date other than the USPS deposit date;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail;" and

(3) The petition includes a true copy of the "Express Mail" mailing label showing the "date-in," and of any other official notation by the USPS relied upon to show the date of deposit.

(d) Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Director to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail;" and

(3) The petition includes a showing which establishes, to the satisfaction of the Director, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

(e) Any person mailing correspondence addressed as set out in § 1.1(a) to the Office with sufficient postage utilizing the "Express Mail Post Office to Addressee" service of the USPS but not received by the Office, may petition the Director to consider such correspondence filed in the Office on the USPS deposit date, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has no evidence of receipt of the correspondence;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail";

(3) The petition includes a copy of the originally deposited paper(s) or fee(s) that constitute the correspondence showing the number of the "Express Mail" mailing label thereon, a copy of any returned postcard receipt, a copy of the "Express Mail" mailing label showing the "date-in," a copy of any other official notation by the USPS relied upon to show the date of deposit, and, if the requested filing date is a date other than the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS, a showing pursuant to paragraph (d)(3) of this section that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day; and

(4) The petition includes a statement which establishes, to the satisfaction of the Director, the original deposit of the correspondence and that the copies of the correspondence, the copy of the "Express Mail" mailing label, the copy of any returned postcard receipt, and any official notation entered by the USPS are true copies of the originally mailed correspondence, original "Express Mail" mailing label, returned postcard receipt, and official notation entered by the USPS.

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(g) Any person who mails correspondence addressed as set out in § 1.1 (a) to the Office with sufficient postage utilizing the "Express Mail Post Office to Addressee" service of the USPS, but has the correspondence returned by the USPS due to an interruption or emergency in "Express Mail" service, may petition the Director to consider such correspondence as filed on a particular date in the Office, provided that:

- (1) The petition is filed promptly after the person becomes aware of the return of the correspondence;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail";
- (3) The petition includes the original correspondence or a copy of the original correspondence showing the number of the "Express Mail" mailing label thereon and a copy of the "Express Mail" mailing label showing the "date-in"; and
- (4) The petition includes a statement which establishes, to the satisfaction of the Director, the original deposit of the correspondence and that the correspondence or copy of the correspondence is the original correspondence or a true copy of the correspondence originally deposited with the USPS on the requested filing date. The Office may require additional evidence to determine if the correspondence was returned by the USPS due to an interruption or emergency in "Express Mail" service.

(underlining added).

- 13.) To the extent that 37 CFR 1.181 applies, section (f) provides that any petition under that rule which is not filed "within two months of the mailing date of the action or notice from which relief is requested may be dismissed as untimely, except as otherwise provided". (underlining added)

C. ARGUMENT

- 14.) Applicants' original Petition is governed by MPEP §711.03(c) (I)(B) and 37 CFR 1.10(e), not MPEP 711.03(c)(III)(A)(2) as set forth in the Decision.
- 15.) Applicants' original Petition satisfied 37 CFR 1.10 (e) in that it contained a true copy of their January, 1998 response along with an indication of the Express Mail number, included an explanation as to why the filing of the Petition was delayed satisfying section (e)'s requirement that a petition be filed promptly after the person becomes aware that the Office has no evidence of receipt of the correspondence, and otherwise satisfied section (e).
- 16.) Section (e)'s requirement that a petition be filed "promptly after the person becomes aware that the Office has no evidence of receipt of the correspondence" tolls the two month response time of 37 CFR 1.181 and constitutes an exception to the two month time period.

- 17.) MPEP §711.03(c) (I)(B) and 37 CFR 1.10(e) do not require “a Notice of Appeal (and appeal fee required by 37 CFR 41.20(b)(2)), an amendment that prima facie places the application in condition for allowance, a Request for Continued Examination (RCE) and submission (37 CFR 1.114), or the filing of a continuing application under 37 CFR 1.53(b)” as the Decision states.
- 18.) Because the original Petition satisfies MPEP §711.03(c) (I)(B) and 37 CFR 1.10(e) the Applicants request reconsideration of the Decision, renew their request that holding of abandonment be withdrawn and request that the holding be withdrawn.

D. REQUEST TO WITHDRAW HOLDING OF ABANDONMENT

Based on the above statement, the Applicants respectfully request withdrawal of the holding of abandonment in this application.

APPLICANT HEREBY PETITIONS FOR WITHDRAWAL OF THE HOLDING OF ABANDONMENT IN THIS APPLICATION.

1. Petition Fee:
No Fee is believed due.

2. Reply:

A reply to the October 3, 1997 Final Office Action is included in the Exhibit labeled “1999 Petition Papers”.

3. Terminal Disclaimer with disclaimer fee:

Applicants request an indication from the Office of Petitions as to whether a terminal disclaimer is required. Given the fact that the USPTO lost the file history of the instant application and did not reach a decision on Applicants’ Petition for over 10 years the filing of such a disclaimer appears to be wholly unjustified. **The Applicants request that the Office of Petitions contact the undersigned to**

discuss this matter further before reaching a decision of the instant Request for Reconsideration.

If however, a fee is deemed necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment for any such fee, or credit any overpayment to Deposit Account No. 50-3777 for any additional fees required under 37 C.F.R. § 1.16 or under 37 C.F.R. § 1.17; particularly, petition fees or extension of time fees.

II. PETITION TO REVIVE

In the event the Applicant's Petition to Withdraw is not granted, the Applicants hereby alternatively petition for revival of the above-referenced application. The above-identified application was unintentionally abandoned. The entire delay in filing the required reply, namely the response to the Final Office Action, from the due date for the reply until the filing of this petition under 37 CFR 1.137(b) was unintentional. Thus, the abandonment was unintentional.

APPLICANT HEREBY PETITIONS FOR REVIVAL OF THIS APPLICATION

1. Petition Fee

Other than Small Entity - fee **\$1,620.00** (37 C.F.R. 1.17(m)). The Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment for this fee, or credit any overpayment, to Deposit Account No. 50-3777 as well as for any additional fees required under 37 C.F.R. § 1.16 or under 37 C.F.R. § 1.17; **particularly, petition or extension of time fees.**

2. Reply and/or Fee

A Request For Continued Examination (RCE) has been filed concurrently along with a copy of the response to the October 3, 1997 Final Office Action.

3. Terminal Disclaimer with disclaimer fee

Applicants request an indication from the Office of Petitions as to whether a terminal disclaimer is required. Given the fact that the USPTO lost the file history of the instant application and did not reach a decision on Applicants' Petition for over 10 years the filing of such a disclaimer appears to be wholly unjustified. **The Applicants request that the Office of Petitions contact the undersigned to discuss this matter further before reaching a decision of the instant Request for Reconsideration**

4. Statement. The entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition under 37 CFR 1.137(b) was unintentional.

By: /John E. Curtin/
John E. Curtin, Reg. No. 37,602

CAPITOL PATENT & TRADEMARK LAW FIRM, PLLC
P.O. Box 1995
Vienna, Va. 22183
(703) 266-3330